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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 97

ANSEL HIGGINS,

Petitioner,

vs.

CARR BROTHERS COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

BRIEF FOR PETITIONER.

EDWARD B. PERRY,
Counsel for Petitioner,
FRANZ U. BURKETT,
Of Counsel.

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ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

BRIEF FOR ANSEL HIGGINS, PETITIONER.

Opinions Below.

The opinions below have not as yet been officially reported. The opinion of the Justice of the Superior Court for Cumberland County, dated May 5, 1941, is printed commencing on Page 1 of the Transcript of Record. The opinion of the Supreme Judicial Court of the State of Maine, dated February 25, 1942, is printed commencing on Page 5 of the Transcript of Record.

Jurisdiction.

Petition for writ of certiorari was docketed May 20, 1942. Certiorari was granted June 8, 1942. Jurisdiction is conferred upon this Court by section 237 (b) of the Judicial Code as amended by Act of February 13, 1925.

Statement of the Case.

This was an action brought by the petitioner to recover from the respondent unpaid minimum wages and unpaid overtime compensation for the period from October 24, 1938, to July 24, 1940, and an additional equal amount of liquidated damages, pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060).

It was alleged by the petitioner that both the petitioner and the respondent were engaged in interstate commerce during said period and that Sections 6 and 7 of said Act were violated by the respondent in respect to the payment of minimum wages and overtime compensation.

The plea of the general issue was filed with a brief statement of special matter of defense denying the petitioner and respondent were engaged in interstate commerce.

The writ was dated April 1, 1941, and by agreement of counsel entered as of the April Term, 1941, in the Superior Court, judgment to be rendered at the return term upon evidence given in the case of *Robert W. Ricker, et als.* v. *Carr Brothers Company*, No. 7946, heard at the March Term of said court, in so far as said evidence should be pertinent to this action. Right to except as to matters of law was reserved by both parties.

In the finding of court the Justice found that respondent was engaged in the sale and distribution of fruits, vegetables and groceries to the retail trade, obtaining part of its merchandise from local sources and part from without

the state. During the first ten weeks of the above named period, the finding of court states, deliveries of respondent's merchandise were made in New Hampshire and both petitioner and respondent were engaged in interstate commerce for said ten weeks and a recovery was allowed for this ten weeks; HOWEVER, the finding of court further states that after these deliveries to New Hampshire stopped then the transactions ceased to be interstate in character and the provisions of the Act did not apply thereafter. (Tr. 1.)

Petitioner claimed that in the court's finding, commerce, within the meaning of the Fair Labor Standards Act, did not exist during the whole period of petitioner's employment, was an error of law and that he was aggrieved thereby; and exceptions were taken and allowed, and overruled by the Supreme Judicial Court of Maine. (Tr. 5.)

Description of Respondent's Business and of the Duties of Respondent's Employee.

Respondent is a corporation, which conducts a wholesale produce and grocery business at No. 217 Commercial Street, Portland, Maine. Respondent handles a general line of fresh fruit and vegetables, canned goods, nuts, candy, cheese, pickles, etc. In 1940 its gross sales amounted to nearly $500,000.00. It employs approximately twenty-five employees, including warehousemen, truck drivers, office workers, salesmen, laborers, etc.

Shipments from out of the state arrive daily at the respondent's warehouse by means of the common agencies of interstate transportation. From 50% to 60% of its purchases come from without the state. Some commodities are shipped in by rail and some by trucks. Other goods are picked up by the respondent's own trucks from pool cars, freight stations, or the warehouses of brokers or manufacturers' agents in Portland.

A great bulk of respondent's goods move through the warehouse and are delivered to respondent's customers in the same package, bag or carton in which they are received.

Respondent has been in the wholesale business in Portland since 1909. The great majority of its customers are regular customers to whom respondent has sold for many years. The stock of goods in the warehouse corresponds substantially to the amounts necessary to fill recurring orders received in the usual course of trade.

Rapid turnover is the rule in respondent's business. Profit is made only when the goods move to the retailer. The longer any particular item remains in stock the greater must be the charges made against it for interest on inventory investment, for insurance, for warehouse space, and other charges, and the greater the risk of spoilage and deterioration or that the product will lose favor with customers. In other words, in respondent's business, no profit is made on storage. It is essential to maintain as high a turnover rate as possible and to keep the goods moving.

While occasionally respondent may purchase a stock of some items several months in advance, most items remain in the warehouse no longer than necessary to match orders which are coming in from continually recurring sources along well defined routes. There is no need for respondent to maintain a larger stock, for most items handled can be secured within a few days from out-of-state concerns; many items can be shipped over night if ordered by wire or long distance telephone. Frequently, orders come in for products which are out of stock and respondent must make purchases to fill such orders. In some cases, the goods are without the state at the time the orders are taken.

The area in which the respondent distributes goods corresponds roughly to the general area of distribution of other competing wholesalers operating both in and outside of the State of Maine. Wholesalers competing directly

with respondent not only typically receive the bulk of their goods from outside of the state in which their warehouses are located, but substantial amounts of the goods which they handle are shipped out by them across state lines.

The evidence shows that customers in Maine are served by wholesalers in other New England States. For example, it is shown by the evidence that respondent competes with a wholesaler located in Boston. In other words, trading areas of wholesalers competing with respondent frequently overlap state lines. Respondent can, therefore, by underselling, cause Boston wholesalers to lose Maine customers and thereby divert the normal flow of goods in interstate commerce, although respondent itself might distribute nothing across state lines.

Wholesalers compete primarily on a price basis and the industry is extremely sensitive to price competition. Quality is standardized and there can be little difference in service. Labor costs concededly constitute a large proportion of total operating expenses. The margin of profit in wholesaling is relatively small, so that increased or decreased labor costs are unavoidably reflected in price. A wholesaler paying lower wages than his competitors or reducing his labor costs by exacting long hours of work, translates his saving in labor costs into lower prices. Such underselling forces others to meet the competition and encourages and promotes the lowering of labor standards by competitors so that they can meet the lower prices. The only alternative to meeting the prices is to relinquish the business, thus restricting interstate competition.

Wholesalers are middlemen situated at an intermediary point in the flow of goods in the channels of commerce from manufacturers to retailers. Their business is that of distribution, the gathering together of products from all parts of the United States, assembling them as needed by their customers and transporting them to the many retail and

institutional outlets. The wholesaler furnishes the connecting link between the interstate shipper on the one hand and the retail stores and consumers on the other hand. The products move rapidly and continually through the hands of the wholesalers without any change in form and for the most part without even being unwrapped. The products must move smoothly and rapidly through the wholesalers if the incoming interstate movement is not to be obstructed.

Its business is a focal point in the distribution and a strike over wages and hours would immediately result in the blocking of the movement of goods into and from the respondent's warehouse. All shipments from out of the state to the respondent would have to cease. The flow of goods from Massachusetts, Florida, California and New York would most certainly be disrupted. Such strikes have repeatedly occurred in the wholesale trade and the respondent is not immune from a similar action by its employees.

By far, the most frequent immediate cause of strikes has been the demand for shorter hours and increased wages or a resistance to decreased wages.

Petitioner was in the employ of the respondent from October 24, 1938 to July 24, 1940. From October 24, 1938 to April 1, 1939, he worked from 8 o'clock in the evening until 8 o'clock in the morning, six days a week, putting up orders, handling freight and taking care of customers. From April 1, 1939 to July 24, 1940 he worked from 6:30 o'clock in the morning until 6 o'clock in the evening, five days a week, and on Saturdays from 6:30 in the morning until 1:30 in the afternoon, working both inside the warehouse and on the local delivery truck. On all days except Saturday, one hour was taken out for lunch. During this whole period petitioner received $16.00 a week as wages. Amount claimed due, including liquidated damages, is $616.38.

Violations of Wage and Hour and Record Keeping Provisions.

The evidence is uncontroverted that the respondent has violated the minimum wage provisions, the overtime compensation provisions, and the record keeping provisions of the Act. These violations occurred in the case of the petitioner and practically all of the other employees. On July 24, 1940, a time clock was installed at respondent's warehouse on the insistence of the Wage and Hour Division.

Statutory Provisions and Regulations Involved.

The preamble of the Fair Labor Standards Act states that the purpose of the Act is "to provide for the establishment of fair labor standards in employments in and affecting interstate commerce." In Section 2 of the Act, Congress found that the existence of labor conditions detrimental to the "maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," burdens commerce and the free flow of goods in commerce, constitutes an unfair method of competition in commerce, leads to labor disputes and interferes with the orderly and fair marketing of goods in commerce.

Section 6 of the Act provides that every employer shall pay to each of his employees who is engaged in commerce [1] or in the production [2] of goods for commerce not less than

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[1] Section 3 (b) defines "commerce" to include "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

[2] Section 3 (j) defines "produced" as produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

the minimum wages prescribed. During the first year from the effective date of the Act (October 24, 1938), the minimum wage rate was 25 cents an hour. On October 24, 1939, the minimum rate become 30 cents.

Section 7 provides that no employer shall employ any employee engaged in interestate commerce or in the production of goods for interstate commerce for a work week longer than 44 hours during the first year from the effective date of the Act unless such employee received compensation for his employment in excess of 44 hours a week at a rate not less than one and one-half times the regular rate at which he is employed. On October 24, 1939, the maximum work week became 42 hours. On October 24, 1940, the maximum work week became 40 hours.

Assignment of Error.

The petitioner assigns as error the denial, in the Supreme Judicial Court of the State of Maine, of his claim for unpaid minimum wages and overtime compensation, alleged to be due him under Section 6 (a) and 7 (a) of the Fair Labor Standards Act, earned during his employment by the respondent from January 1, 1939, until July 24, 1940, on the ground that the respondent was not in commerce within the meaning of said Act during this period.

Issue Presented.

Respondent denies that it was engaged in interstate commerce and denies that its employee was engaged in interstate commerce within the meaning of the Fair Labor Standards Act. The issue, therefore, is:

Were the petitioner and the respondent "engaged in commerce" within the meaning of the Act for a longer period than the first ten weeks following effective date of the Act.

ARGUMENT.

Introduction.

As is apparent, the question in this case is whether respondent's employee was engaged "in commerce or in the production of goods for commerce" within the meaning of that term as used in the Fair Labor Standards Act after January 1, 1939. Petitioner contends that as respondent's employee, he was engaged in commerce within the meaning of the statute and will show that:

(1) Respondent's employee was "engaged in commerce" as that term has been defined by the courts;

(2) The purposes of the Act and the legislative history confirm the conclusion that respondent's employee was engaged in commerce within the meaning of the statute;

(3) Regulation of the wages and hours of the respondent's employee was unquestionably within the constitutional power of Congress.

1.

Respondent's Employee Was "Engaged in Commerce" Within the Meaning of the Fair Labor Standards Act.

A.

Respondent's Employee Was "Engaged in Commerce As That Term Has Been Defined by the Courts.

In one of the earliest decisions of the Supreme Court on the meaning of the "commerce" clause of the Constitution, *Gibbons* v. *Ogden*, 9 Wheat. 1, Chief Justice Marshall devoted considerable space to defining the term "commerce • • • among the several states." The Chief Justice emphasized that the term is "a general term applicable to many objects" (p. 188). He said:

> Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all of its branches, • • •. The word "Among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior. (Pp. 186, 192.)

A half century later, the Supreme Court reaffirmed this doctrine in *Walton* v. *The State of Missouri*, 91 U. S. 275 at 280:

> Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities • • •

The scope of the term "engage in commerce," as used in the Fair Labor Standards Act, even if not regarded as co-extensive with the utmost limits of the commerce power of Congress, does comprehend transactions of the character involved in this case. "Commerce," said the Supreme Court in *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282 at 290:

> • • • is not confined to transportation from one State to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages.[3]

[3] The original package doctrine has recently lost some of its significance as a limitation upon the taxing power of the states. (See *McGoldrick, etc.* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33). It is clear that the doctrine has never been regarded as marking the end of interstate

Where, as in the case at bar, the whole course of business involves a constant flow of goods in interstate commerce pursuant to continually and regularly recurring orders for merchandise produced only by out-of-state concerns, the "commerce" embraces "all the component parts of that intercourse," including the passage of the merchandise through respondent's warehouse and the sale and delivery thereof to their retail customers. Negotiating and contracting for the sale of, and purchasing, selling, assembling, handling and distributing merchandise shipped from one state to another have repeatedly been held to be part of "commerce" within the regulatory provisions of federal statutes. Particularly pertinent here are the decisions holding that wholesalers, commission men and similar intermediary distributors engaged in such activities are engaged in commerce within the meaning and purposes of the Federal Trade Commission Act, the Anti-Trust Act and the Packers and Stockyards Act. The Fair Labor Standards Act seeks to accomplish, among other purposes, the same ends as all of these statutes, that is, to protect commerce against unfair methods of competition, against burdens upon the free flow of goods in commerce, and against interferences with the orderly and fair marketing of goods in commerce.[4]

In *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, the Federal Trade Commission issued a cease and desist order against an association of

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commerce, (see *McDermott* v. *State of Wisconsin*, 228 U. S. 115, 136-137; *Binderup* v. *Pathe Exchange Incorporated, et al.*, 263 U. S. 291 at 311.) It has been consistently recognized that interstate commerce continues at least as long as the imported goods are in the original packages. *Brown* v. *Maryland*, 12 Wheat. 419; *Dahnke-Walker Milling Co.* v. *Bondurant*, *supra*; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500 at 521; *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*, at p. 46.

[4] Recently the Supreme Court took occasion to characterize the Fair Labor Standards Act as one which "seeks to eliminate competition which thrived upon low wages and substandard working conditions." *Apex Hosiery Co.* v. *Lander*, 310 U. S. 469, 595, see note 24.

wholesalers requiring it to abandon the circulation of agreements which fixed prices for sales of merchandise supplied from sources outside of the state. The association claimed that since the seller had the option under the contracts of sale to furnish the goods from local or out-of-state sources of supply, the sales were not in interstate commerce and the fixing of prices was not an unfair method of competition in commerce. The question, as stated by the court, was "whether the sale by the wholesaler to the retailer in the same State is a part of interstate commerce where, subsequently, at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer." (273 U. S. at 63-64.) After reiterating that commerce is a "practical" conception, the Court, speaking through Mr. Justice Butler, held:

> And what is or is not interstate commerce is to be determined upon a broad consideration of *the substance of the whole transaction;* Dozier *v.* Alabama, 218 U. S. 124, 128. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S., 262, 290; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 30, 33. *The absence of contractual relation between the manufacturer and retailer does not matter.* The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the State. If the contract of sale provided for shipment to the purchaser from a mill outside the State, then undoubtedly it would be an essential part of commerce among the States. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 515. Clearly the absence of such a provision does not affect the substance

> of the matter when in fact such a shipment was contemplated and made. *Cf. Dozier* v. *Alabama*, supra; *Western Union Tel. Co.* v. *Foster*, 247 U. S. 106, 113; *Lemke* v. *Farmers Grain Co.*, supra, 55. The election of the seller to have the shipment made from a mill outside the State makes the transaction one in commerce among the States. *And on these facts the sale by jobber to retailer is a part of that commerce.* (Emphasis Supplied) (at 64).

It is significant, in the case at bar, that in the normal course of respondent's business there is not even the contingency that they will fill their customers' orders from sources of supply in the State of Maine since most of the commodities ordered by their customers are not produced in Maine at all. Both respondent and its customers well know that the merchandise they order, week in and week out, must come from out-of-state suppliers.

The absence of an express prior contract between respondent and its customers is inconsequential under the facts of this case. "Clearly the absence of such a provision does not affect the substance of the matter," when in fact it is well known from long practice that the usual source of the business involves shipments from outside the state to supply the retailer, and "when in fact such a shipment was contemplated and made." *Federal Trade Commission* v. *Pacific States Paper Assn., supra* at 64; See also *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 at 54. Certainly if the term "commerce" is to be given the "practical" application required by the decisions of the Supreme Court (Cf. *Swift & Company* v. *United States*, 196 U. S., 375, 396; *Federal Trade Commission* v. *Pacific States Paper Assn.*, supra at 64; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S., 453, 465), a shipment from outside the state to meet an order anticipated by long custom is no less commerce than a shipment to meet an express prior order.

Further confirmation of these principles is found in the case of *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291. New York manufacturers and distributors of motion picture films shipped the films from New York to their several exchanges in Omaha, Nebraska. The distributors at the Nebraska exchanges contracted in turn with exhibitors in Nebraska for the leasing and display of the pictures at named theatres. Deliveries of the films were made through the Omaha exchange. A Nebraska exhibitor brought suit under the Anti-Trust Act against the New York distributor corporations and the distributors at Omaha, alleging a conspiracy in restraint of interstate commerce. The defendants claimed that once the films reached Omaha they ceased to be in interstate commerce and that the Sherman Act was inapplicable. They pointed out that after the films were sent to the Omaha agencies, "they are unpacked and stored at the local offices of the defendants until they begin to rotate among the exhibitors of Nebraska." They contended that the films "become and remain a part of the general property in Nebraska during their entire commercial life;" and that "When a Nebraska exhibitor wishes to rent a film from any of the defendants, he rents it from the Omaha exchange, and, no interstate transaction or movement of the film is involved." (263 U. S. at 297) The majority of the Court of Appeals for the Eighth Circuit, citing a number of cases involving the state power to tax and the fixing of freight rates, sustained this contention, holding that interstate commerce in the films had ceased after delivery to the Omaha agencies. *Binderup* v. *Pathe Exchange*, 280 Fed. 301, 303.

The Supreme Court, through Mr. Justice Sutherland, flatly rejected this argument. At page 309 he said:

> • • • Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held

until delivery to the lessee in the same state, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to the final destination. The general rule is that where transportation has acquired an interstate character "it continues at least until the load reaches the point where the parties originally intended that the movement should finally end." *Illinois Central R. R. Co.* v. *Louisiana R. R. Comm.*, 236 U. S. 157, 163. And see *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113; *Western Oil Refining Co.* v. *Lipscomb* 244 U. S. 346, 349.

Respondent, like the Omaha Exchanges, "represent" out-of-state producers in the marketing of their products. The existence of an express agency relation between the producer and the distributor cannot be regarded as the controlling factor in determining whether the distribution is in interstate commerce. "Commerce among the states," as Mr. Justice Holmes pointed out in *Swift and Company* v. *United States*, 196 U. S. 375, 398, "is not a technical legal conception but a practical one drawn from the course of business." In the *Binderup* case the wholesale distribution of films was done through exchanges operated by the producers. The wholesale distribution of groceries ordinarily is accomplished through independent dealers. But the course of business—the flow of merchandise in interstate commerce to the retailer—is the same. The delivery to the grocery wholesaler does not "end the movement of the commodity"; his handling and distribution of such merchandise is part of and incidental to the stream of commerce to the ultimate destination. And it is of no consequence whether the distribution is carried on through an agent of the manufacturer or through a more independent

dealer. It is commerce, not the ownership of goods moving in it, with which the Fair Labor Standards Act is concerned.

Thus, in the famous case of *Stafford* v. *Wallace*, 258 U. S. 495, the Supreme Court held that the buying and selling of cattle in local stock yards and the charges and practices of the dealers and commission men who negotiate the purchases and sales are activities which "cannot be separated from the movement" and are "indispensable to its continuity." The Court said:

> The stockyards are but a throat through which the current flows and *the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character.* The commission men are essential in making the sales without which the flow of current would be obstructed, and this whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. *The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but on the contrary, being indispensable to the continuity.* (at p. 516.) (Emphasis supplied.)

Decisions holding distributive activities similar to respondent's business operations to be interstate commerce can be multiplied. Exhaustive discussion of these cases is neither necessary nor practicable within the limits of this brief but reference should be made to a few of the decisions relating to grocery wholesalers whose methods of doing business were strikingly similar to respondent's methods.

In *Grand Union Tea Co.* v. *Evans*, 216 Fed. 791 (D. C. D. Oregon, 1914), the plaintiff sought an injunction against the collection of a state license tax imposed upon peddlers. The question was whether the law, as applied to the plaintiff's representative was an unconstitutional interference

with interstate commerce. The court described the plaintiff's method of doing business as follows:

> From the complaint it appears that the plaintiff is a New Jersey corporation engaged in selling goods prepared and manufactured for it by Jones Bros. Company, a New York corporation. The goods, when manufactured, are packed and marked with the label and name of the plaintiff and delivered to it at the factory, from which place they are forwarded by the plaintiff for sale and distribution to various parts of the Union. The plaintiff maintains a store in Portland where a small part of its merchandise is sold at retail over the counter, but the principal part of its business in Oregon is done through solicitors who go regularly from place to place on fixed routes soliciting and taking orders for future delivery. The orders, when taken, are sent to the Portland store by mail, or taken there personally by the solicitors, where they are filled and the goods shipped to or delivered to the solicitors, who deliver the same to the customers and collect the purchase price on their next trip over their respective routes.
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> * * * experience has shown the manager thereof about how many orders will come in each day and each week in the usual course of trade, and in order to fill the continually recurring orders, he will anticipate by a few days only, the procurement of goods sufficient to fill such orders by ordering them from places outside of the state. Goods not of a perishable nature, such as soap and baking powder, are sent from the home office by water to Portland. These goods are, to some extent, kept in stock, but the orders of the Portland store are not greater than may be received in car load lots and as are necessary to fill the constantly recurring orders. Practically all the other goods such as teas, coffees, chocolates, cocoas etc. are ordered from Seattle in the State of Washington in no greater amounts than necessary to fill the recurring orders

> received in the usual course of trade, and so as to match orders which are being taken when the goods to fill them are in transit.

The court held that this business was interstate commerce despite the fact that there were no definite orders from customers prior to the shipments of merchandise:

> It would be a waste of time to review the cases and point out their similarity and dissimilarity to the one in hand. It is enough that in our opinion the facts stated in the complaint bring this case within *Crenshaw* v. *Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. ed. 563, and *Stewart* v. *Michigan*, 232 U. S. 565, 34 Sup. Ct. 476, 58 L. Ed. 736, decided March 23, 1914. The only difference, if any, between it and the Crenshaw case is that it may be assumed, although not stated, that in the Crenshaw case the goods were not ordered by the local representative of the vendor until the customers' orders had been received by him, while in this case, *the shipments were ordered prior to the actual receipt of the customers' orders by the agent*, but before or while such orders were being taken in the field and during the time the goods were in transit. This we take it, does not affect the character of the business. It was a mere matter of detail in the manner of conducting it.

Similar emphasis was placed on the continually recurring character of the interstate purchases and the "constant current of trade and commerce in commodities so purchased" in the decision of the Fifth Circuit Court of Appeals in *Wholesale Grocers' Ass'n.* v. *Federal Trade Commission*, 277 Fed. 657 (C. C. A. 5th, 1922).

In that case, an association of jobbers and wholesalers doing business in El Paso, Texas, combined to keep manufacturers from selling products to a competing wholesaler who also was operating several retail grocery stores in El Paso. The Court of Appeals held that the Associated Job-

bers thereby prevented a competitor "from buying as a wholesaler in interstate commerce as it would have done without such opposition" (at 662), and combined "by that means to obstruct or prevent that company from competing as a wholesaler." (at 664) The court held that such activities were clearly unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act, emphasizing the fact that the boycotted company "purchases commodities dealt in by it in the various states and territories of the United States, and transports the same through other states, and territories to the City of El Paso in the State of Texas, where such commodities are resold, and there is continuously * * * a constant current of trade and commerce in commodities so purchased by the said * * * company between and among the various states and territories of the United States." (P. 658.)

See also *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600 upholding the Federal Trade Commission's right to enjoin a group of retailers from combining to boycott a wholesaler so as to prevent such wholesaler from competing for local retail trade; *Federal Trade Commission* v. *Wallace*, 75 F. (2d) 733, (C. C. A. 5th, 1935); *Southern Hardware Jobbers' Ass'n. et al.* v. *Federal Trade Commission*, 290 Fed. 773 (C. C. A. 5th, 1923).

In *Schechter Corp.* v. *United States*, 295 U. S. 495, the transactions involved were as follows: Live poultry was shipped by rail from other states to the Manhattan Terminal in New York City and to terminals in New Jersey serving New York City. The poultry was received at the terminals by commission men or "receivers." The receivers would have the poultry unloaded at the terminals, inspected and put into coops. They would sell some of the poultry at the terminals, but the remainder was loaded on trucks and trucked to the West Washington Market in New York City

where further sales were made by the commission men. A large proportion of these sales of poultry were made to purchasers (such as the Schechter Corporation) from the West Washington Market, after the poultry had been trucked from the terminal where it was first received. The Supreme Court, in effect, held that the interstate commerce continued through the sale by the receivers and until delivery to the purchasers' slaughter houses. The court pointed out that the Code provisions there invalidated concerned the operations by the purchasers from the commission men and did not "concern the transportation * * * or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees" to their customers (at 542). The Court continued:

> When *defendants* [customers of the commission men] had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughter houses in Brooklyn for local disposition. The interstate transactions in relation to that poultry *then* ended. (Emphasis supplied.)

The "interstate transactions" prior to the arrival of the poultry at defendants' slaughter houses included (a) the receiving of the poultry by the commission men, (b) unloading of the poultry at the terminals, (c) putting the poultry in coops, (d) loading it on trucks and trucking it from the terminals to the West Washington Market, (e) the sales by the commission men at the market and (f) trucking the poultry to the slaughter houses of the purchasers. In other words, the "interstate transactions" included all of "the transactions of the commission men" and in addition included the delivery of the goods from the place of business of the commission men to the place of business of their customers.

The respondent here occupies the same place in the stream of commerce as the commission men in the *Schechter*

case and not the place which the Schechters occupied. Respondent, like the commission men, receives most of its goods directly from out-of-state sources. As the commission men unload, coop, inspect, and assemble their poultry at the terminals and at the market place before sale and distribution, so respondent unloads and assembles its merchandise at its warehouse. The commission men distribute their poultry to customers who slaughter and then resell, while respondent distributes its goods to retailers who merely resell without processing of any kind. In short, respondent's transactions are no further removed from the interstate movement than the activities recognized as "interstate transactions" in the *Schechter* case.

It necessarily follows from what we have already shown that the employees who perform and execute respondent's transactions in interstate commerce are themselves engaged in interstate commerce. In fact, unloading and warehousing of interstate shipments have specifically been held to be part of interstate commerce even under statutes of far more limited application than the Fair Labor Standards Act.[5]

In *B. & O. S. W. Railroad* v. *Burtsch*, 263 U. S. 540 (1924), a shipment of heavy machinery came into Indiana from

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[5] This conclusion is made doubly clear by the earlier decision of the Supreme Court in *Local 167* v. *United States*, 291 U. S. 293, where the court affirmed an injunction against a conspiracy to violate the Anti-Trust Act by marketmen, teamsters and slaughterers in the live poultry industry in and about New York City.

It has some times been assumed that the *Schechter* case, or at least certain dicta in the case, are authority for the claim for a narrow construction of "interstate commerce;" Any such implication attributed to that case is in conflict with the later decisions of the Supreme Court. See *Jones and Laughlin Steel Corp.* v. *N. L. R. B.*, 301 U. S. 1, 40; *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U. S. 453; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197; *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601. In each of these cases the minority of the court was of the opinion that the *Schechter* case had been repudiated by the majority. *Jones and Laughlin Steel Corp.* case, *supra* at 76; *Santa Cruz Fruit Packing Co.* case, *supra*, at 470; *Consolidated Edison Co.* case, *supra*, at 241; *N. L. R. B.* case, *supra*, at 612-614. See also *N. L. R. B.* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4th).

Kentucky. One of the purchasers came to the side track and helped the railroad employee unload the machinery from the car. The purchaser was injured in the process of unloading. The Supreme Court, through Mr. Justice Sutherland, held that the unloading was so closely related to the interstate shipment as to be a part of it within the meaning of the Federal Employers Liability Act.

> It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically part of it • • •

In the case of *Erie R. R. Co.* v. *Stuart*, 250 U. S. 465 (1919) suit was brought against the railroad for negligent injury to stock "during transportation". The stock had been injured by a collision while the freight car was on a spur track being unloaded. It was urged in the case that the transportation had ended when the accident occurred. The court held that the interstate transportation "was still in progress" and continued through the unloading.

This ruling was reaffirmed by the Supreme Court in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213. In that case, appellant argued that since its business was separated from the railroad's business and since it exercised no control or participation in the operation of the railroad, its loading and unloading business was not part of the transportation within the regulatory power of the Interstate Commerce Commission. The court rejected this argument holding that the transportation ended "only after unloading for delivery or tender to the consignee at the place of destination". (308 U. S. at 219.) See also *Puget Sound Stevedoring Co.* v. *State Tax Commission of Washington*, 302 U. S. 90 (1937).

In regard to warehousing activities, the Supreme Court, in an opinion by Mr. Justice Hughes, held that the ware-

housing of goods by a railroad after the arrival at the point of destination is "a terminal service forming a part of the 'transportation' in the sense of the Federal Act and covered by that Act;" that it is "incident to interstate shipment". *Southern Railway* v. *Prescott*, 240 U. S. 632, at 638. To the same effect see *Cleveland C. C. & St. L. Railway* v. *Dettlebach*, 239 U. S. 586.

It is significant that these decisions were concerned only with *transportation*, which is but one phase or aspect of *commerce*. The Fair Labor Standards Act is not limited in its application to transportation but covers all employees who are engaged "in commerce".[6] And it is clear from the Supreme Court decisions made such as *Gibbons* v. *Ogden*; *Federal Trade Commission* v. *Pacific Paper Assn.*; *Binderup* v. *Pathe Exchange*; *Swift* v. *United States*; *Stafford* v. *Wallace*; all discussed in full above, that the stream of "interstate commerce extends considerably beyond unloading and warehousing. These, and numerous other decisions of the Supreme Court, have indicated that a remedial statute, of the character of the Fair Labor Standards Act, must be given a practical application, an application which comprehends "all commercial intercourse between different states *and all the component parts of that intercourse.*" *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52 at 63.

[7] It is obvious from the decisions that the fact that the

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[6] "Commerce covers the whole field of which transportation is only a part." *Chicago & North Western Ry. Co.* v. *Belle*, 284 U. S. 74, at 78. See also *Pennsylvania R. R. Co.* v. *Public Utilities Commission of Ohio*, 298 U. S. 170 at 174; *Atlantic Coast Line Ry.* v. *Railroad Commission of Georgia*, 281 Fed. 321 (D. C. N. B., Ga. 1922).

[7] See in addition to the cases discussed in the text, *Virginian Ry.* v. *Federation*, 300 U. S. 515, holding "back shop" employees, engaged in repairing locomotives and cars completely withdrawn from service for periods as long as three months, to be engaged in interstate operations within the scope of the Railway Labor Act; *York Manufacturing Co.* v. *Colley*, 247 U. S. 21, holding installation of ice machinery shipped from

activities take place locally does not mean that they are not part of interstate commerce. As the Supreme Court recently pointed out in the case of *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167:

> • • • The regulatory power of the Congress is customarily exercised on transactions taking place within the state on the principle that such acts are an essential part of interstate commerce (at 179, footnote 39).

Also, in determining whether activities are within the stream of interstate commerce, it is of little significance whether the activities take place at the beginning or at the end of the interstate journey. In the *Pacific Paper Case*, the *Binderup* case, the *Dahnke-Walker* case, the *Burtsch* case, the *Erie Railroad* case, and the *York Manufacturing Co.* case—in all these cases the activities held to be part of interstate commerce where at the end of the interstate

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outside the state was "immediately and inherently connected with interstate commerce", (at p. 26) although the installing consumed about a month after the machinery reached its destination; *Kansas City Southern Railway Co.* v. *Martin*, 262 Fed. 241 (C. C. A. 5th, 1920); and *I. C. R. Co.* v. *Porter*, 207 Fed. 311 (C. C. A. 6th, 1913), holding employees engaged in the repair of a railroad track or railroad bridge to be engaged in interstate commerce within the meaning of the Employers Liability Act. See also *Currin* v. *Wallace*, 306 U. S. 1, 9, and *Mulford* v. *Smith*, 307 U. S. 38, 48, holding that sales of tobacco in a local warehouse "constitute interstate commerce," where in the regular course of business purchasers would subsequently ship most of the tobacco out of the state.

In a recent case involving the application of the Fair Labor Standards Act the Federal District Court in Texas held that "red caps" engaged in carrying baggage at a railroad terminal were engaged in commerce, and stated the applicable test as follows: "The rule which is now recognized and which has been reiterated, is, that the test of whether an employee is engaged in interstate commerce, is whether he was so engaged, or, in work so closely related to such transportation as to be practically a part of it; whether he facilitates interstate commerce." *Pickett* v. *Union Terminal Co.*, 33 F. Supp. 244, 247 (D. C. N. D. Texas, 1940).

journey and no further shipment across state lines was contemplated.[8]

B.

The Purposes of the Act and the Legislative History Confirm the Conclusion that the Respondent's Employee Was Engaged in Commerce Within the Meaning of the Statute.

The decisions just discussed establish that respondent and its employee were engaged in commerce. This is sufficient basis for concluding that they are subject to the terms of the Fair Labor Standards Act. If further confirmation were needed, ample evidence is to be found in the purposes sought to be accomplished by the Act and in the legislative history. Examination of the Fair Labor Standards Act indicated purposes which are not narrow, but at least as broad as the similar purposes of the Railway Labor Act, the National Labor Relations Act, the Packers and Stockyards Act, the Federal Trade Commission Act, and the various federal anti-trust laws. As the decisions amply demonstrate, Congress has attempted by these laws to prevent or control unfair methods of competition in commerce and to eliminate restraints and burdens upon the free flow of commerce among the states.

The underlying aims of the Fair Labor Standards Act were aptly summarized in the recent opinion of the Circuit

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[8] The United States Wholesale Grocers Association, shortly after the Act was passed, distributed the opinion of its counsel advising that employees of wholesale grocers purchasing merchandise across state lines come within the provisions of the Fair Labor Standards Act, including wholesalers who resell entirely within the state where the goods are received.

In the recent case of *Fleming* v. *Alterman Bros.*, 38 F. Supp. 94, Judge Russell of the U. S. District Court of Georgia, rendered an opinion holding that an importing wholesale grocer which does not ship out of the state is covered by the Act. Alterman Bros. conduct a business similar to the defendant.

Court of Appeals for the 8th Circuit in *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52:

> In Section 2 of the Act, the findings of Congress are stated, to the effect that there exists in industries engaged in interstate commerce labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers, which have caused an unwholesome state of affairs in intertsate commerce, resulting in such conditions being perpetrated among the workers of the several states and burdening commerce and the free flow of goods in commerce, and resulting also in unfair methods of commerce, labor disputes, and interference with the orderly and fair marketing of goods in interstate commerce. The preamble may be properly referred to to assist in ascertaining the intent and meaning of a statute susceptible of different constructions. *Price* v. *Forrest*, 173 U. S. 410, * * *. The manifest declared purpose of the statute was to eradicate from interstate commerce the evils attendant upon low wages and long hours of service in industry. Accepting this as the declared purpose of the Act, exemptions would tend to defeat its purpose. The statute is remedial, with a humanitarian end in view. It is therefore entitled to a liberal construction. *Grier* v. *Kennan*, 8 Cir., 64 F. 2d 605.
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> We must assume that all employees in interstate commerce so far as reasonably possible, should be made subject to the provisions of the Act. This is emphasized by the title (*United States* v. *Katz*, 271 U. S. 354, * * *) the findings and declaration of policy contained in Section 2, the inclusiveness of the language of Section 6 ("Every Employer"), and of Section 8 (a), reciting that "The objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce," etc. (at p. 56).

The statute seeks to accomplish several specific aims. In the first place, minimum standards of hours and wages were

provided following a long developed policy of Congress to exercise its commerce power to prevent the spread of conditions deleterious to health, efficiency and general welfare. Compare *Virginian Railway Case, supra; United States* v. *Lowden*, 308 U. S. 225, 234; *Brooks* v. *United States*, 267 U. S. 432, 436; *Hipolite Egg Co.* v. *United States*, 220 U.S. 45. Secondly, Congress, recognizing here as it recognized in the National Labor Relations Act that substandard labor conditions lead to strikes and other obstructions of the free flow of goods in commerce, sought to prevent such interruptions by eliminating their causes at the very source. See *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1; *Santa Cruz Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453. Congress sought also to assure the orderly and fair marketing of goods in interstate commerce (cf. *Mulford* v. *Smith*, 307 U. S. 38, and *Currin* v. *Wallace*, 306 U. S. 1) and finally, to prevent wage cutting and other unfair methods of competition, Cf. *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304, *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245.

For the effective accomplishment of these purposes, the Fair Labor Standards Act must be given the broad construction referred to by the court in the *Hawkeye* case. That construction is no more than the necessities of the problems regulated require. Because modern competition among the wholesalers is no respecter of state boundaries and because substandard labor conditions in any one area affect a much larger region and obstruct the channels of interstate commerce through several states, a restrictive construction would defeat the purposes of the Act.

[9] In a recent decision in an employee's suit for wages due

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[9] The Supreme Court recently observed: "* * * *the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing.* The merest glance at state and

under the Fair Labor Standards Act (*Wood* v. *Central Sand and Gravel Co.*, 33 F. Supp. 40 (D. C. W. D., Tenn., 1940) the court said:

> To accomplish the beneficent purposes of the Act, Congress manifestly intended and expected the courts to apply broadly and liberally the coverage of the Act • • • The legislative history of the Act supports this view, and it would be plainly defeating the clear intention of Congress should the courts limit the applicability of the Act by restrictive judicial contraction of interstate commerce (at p. 43).

In the distribution of food products, the forces of competition rage with particular intensity. A large number of wholesale grocers occupy the field, marketing identical or very similar products. Profits are made from quantity sales at rapid turnover; the profit on each individual item is small. The principal cost factor in wholesale operations is that of labor. Consequently, a lowering of wage levels in a wholesale establishment results in the ability to lower prices; a lowering of prices almost inevitably brings increased business to the wage-cutter—to the corresponding detriment of wholesalers whose wage rates have been maintained. In this direct fashion are the evils of unfair labor standards communicated to an entire competitive area overlapping many state lines.

Respondent is in direct competition with out-of-state concerns selling directly to retailers and with wholesalers marketing across state lines. The employees of these distributors are admittedly covered by the provisions of the Fair Labor Standards Act and if the Act did not likewise cover the employees of the respondent, it is manifest that

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federal legislation on the subject demonstrates the force of the *argument that labor relations are not matters of mere local or private concern.*" (Emphasis supplied). *Thornhill* v. *Alabama*, 310 U. S. 88, 103, See also *Morehead* v. *New York, ex rel. Tripaldo*, 298 U. S. 587, 635.

these competing distributors would be placed at a serious competitive disadvantage. A lowering of wage rates and a raising of hours of work without overtime compensation on the part of respondent could enable them to dominate the business which formerly went to employers complying in full measure with the terms of the law. While it is not claimed that the character of respondent's activities as interstate commerce may be determined simply by the character of the activities of their competitors, it must be reiterated that "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." (*Swift & Co.* v. *United States, supra*). The "practical" construction of an Act such as this requires that it be applied to as many employers and employees in the same competitive class as can reasonably be included within the language used by Congress. Permitting some employees the benefits of the Statute while denying them to others in precisely the same position from a practical economic standpoint will only defeat the purpose to remove from the competitive struggle the cost of maintaining minimum wage and hour standards for labor, and "to eliminate competition which thrived upon low wages and substandard working conditions." See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 504, note 24.

It is clear that the framers of the Fair Labor Standards Act did not intend a restrictive application of the Act. They envisaged so broad an application to all employees in the chain of distribution that where they felt it inadvisable to apply the Act, they inserted express exemptions. Thus, in Section 13 (a) (1) it is provided that the wage and hour requirements "Shall not apply with respect to any employee in a bona fide * * * local retailing capacity." Unless this exemption is to be regarded as having no significance, it must be concluded that Congress exempted such workers at the end of the interstate distributive proc-

ess because Congress believed that otherwise they would be within the scope of the wage and hour provisions of the law. And if such a person—the local store clerk, the department store saleslady, for example—may be "engaged in commerce" within the meaning of the act, *A fortiori* employees of wholesalers in the middle of the distributive chain are also included within that meaning.

This conclusion is borne out by a reading of the legislative debates themselves, an interpretative aid recently employed by the Supreme Court in *United States* v. *American Trucking Association, Inc.*, 60 Sup. Ct. 1059. See also *United States* v. *Dickerson*, 60 Sup. Ct. 1034 (Decided May 27, 1940); *Fleming* v. *Hawkeye Pearl Button Co., supra; Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 198-9. In delivering and explaining the conference report on the final draft of the bill which the Senate subsequently enacted into law as the Fair Labor Standards Act of 1938, Senator Borah pointed out that the conference committee had sought to exercise the full limits of congressional power as to employees engaged in interstate commerce within the principles outlined by Chief Justice Marshall in *Gibbons* v. *Ogden, supra.*[10] Senator Wagner stated in the same discussion that, "my prediction is that the same workers whom the courts have held to be in or directly affecting interstate commerce under the National Labor Relations Act will be regarded as subject to the Federal commerce power under the provisions of the bill which we are now considering.[11]

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[10] 73 Cong. Rec. 9172. The discussion of Senator Borah indicating the intention of the framers of the draft to exercise the congressional power is of particular interest. See 83 Cong. Rec. 9166-9178.

[11] 83 Cong. Rec. 9173. The National Labor Relations Board, as early as February, 1938, asserted jurisdiction over wholesalers similar to defendants. Matter of *West Coast Drug Company*, etc., 5 N. L. R. B. 70. Cf. also *Matter of General Motors Sales Corporation, Parts Division*, (Aug. 26, 1940); *Matter of Union Premier Food Stores*, 10 N. L. R. B. 370.

The application of the law to wholesalers was specifically discussed by the House of Representatives when it considered one of the earlier drafts of the bill which eventually became the Fair Labor Standards Act. An amendment offered by Congressman Coffee to exempt wholesalers of certain agricultural products elicited spirited criticism,[12] and was voted down 145 to 113.[13]

Relying on such unequivocal expressions of Congressional intention, as well as on the numerous decisions of the courts set forth in the earlier part of this brief, the Administrator of the Wage and Hour Division announced soon after the Act went into operation that employees of wholesalers receiving merchandise from outside of the state were to be considered entitled to the wage and hour benefits of the law, regardless of whether the merchandise was resold within or beyond the border of the state in which the employer's business was located. This interpretation was contained in paragraphs 14-16 of the Interpretative Bulletin No. 5, issued by the Wage and Hour Division. In speaking of such interpretations of the Wage and Hour Division, the Supreme Court recently took occasion, in *United States* v. *American Trucking Association, Inc.*, 60 Sup. Ct. 1059 (U. S. May 1940), to remark:

> In any case such interpretations are entitled to great weight. This is peculiarly true where the interpretations involve "Contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." (*Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.)

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[12] 83 Cong. Rec. 7421-7422.

[13] 83 Cong. Rec. 7423.

See also *United States* v. *State of Minnesota*, 113 F. (2d) 770, 774 (C. C. A. 8th).

What has happened in Congress since this Administrative interpretation was adopted by the Wage and Hour Division is no less instructive than the discussions which preceded passage of the Act. On May 11, 1939, an amendment was offered to exempt employees of wholesalers from the overtime provisions of the Act.[14] Again on June 5, 1939, the sponsor of the amendment called it to the attention of the House specifically referring to its application to employees of distributors of food stuffs.[15] This proposed amendment never passed the House.

The next spring, on April 30, 1940, another attempt was made to exempt "employees who are working for wholesale grocers."[16] This amendment, offered as an amendment to the Barden Bill, was defeated when the entire Barden Bill (Proposing a number of amendments) was voted down.[17] The amendment was reintroduced on May 2, 1940, as a floor amendment to the Norton Bill. The following day, when the House was considering further amendments to the Norton Bill, an exemption was proposed for "any employee who is employed in any bona fide wholesale establishment."[18] Both of these proposals were likewise defeated when the House rejected the Norton amendments.[19]

The conclusion to be drawn from these repeated attempts and repeated failures to exclude the employees of wholesalers and distributors from the operation of Sections 6 and

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[14] 84 Cong. Rec. 5474.
[15] 84 Cong. Rec. 6633.
[16] 86 Cong. Rec. 8074.
[17] 86 Cong. Rec. 8086.
[18] 86 Cong. Rec. 8439.
[19] 86 Cong. Rec. 8463.

7 of the Act is that these employees were within the intention of Congress as they are within the letter of those provisions. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 414; *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 174 (D. C. E. D. Mo.), aff'd 258 U. S. 451. As the Supreme Court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488, recently said with respect to the judicial construction of the Sherman Anti-Trust Act, and the subsequent failure of Congress to change this construction:

> The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute of labor unions has brought forth sharply conflicting views both in the Court and in Congress, and where after the matter has been fully brought to the attention of the people and the Congress, the latter has not seen fit to change the statute.

For the same reasons the refusal of Congress during more than three years of systematic campaigns to amend the provisions of the Fair Labor Standards Act, and its failure to pass any of the three specific bills exempting employees of wholesalers in the position of petitioner's employees, must be considered an implicit recognition of the correctness of the Administrative interpretations. Giving that interpretation the "great weight" which the Supreme Court has said that it deserves, it is respectfully submitted that respondent's employees are entitled to the wage and hour benefits of the Act.

C.

Regulation of the Wages and Hours of Respondent's Employee Was Unquestionably Within the Constitutional Power of Congress.

We have shown in the preceding sections of the argument that respondent's employee was "engaged in Commerce among the several states," according to the rulings of the courts and within the clear intent of Congress. The power of Congress to prescribe standards of wages and hours of employees engaged in interstate commerce has been repeatedly sustained. *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; *Wilson v. New*, 243 U. S. 332; Cf. *Patterson v. Mark Eudora*, 190 U. S. 169. Numerous decisions under the Fair Labor Standards Act itself uphold the constitutionality of the wage and hour provisions of Sections 6 and 7 of the Act.[20]

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[20] In *United States v. Darby Lumber Co.*, 61 S. Ct., 451, Mr. Justice Stone (now Chief Justice) said:

> The power of Congress over interstate commerce is *not* confined to the regulation of commerce among the states. It extends to those activities intrastate which so *affect* interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.
>
> Footnote: It may prohibit wholly intrastate activities, which, if permitted, would result in restraint of interstate commerce.
>
> Congress has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any shipper or producer.

Nor can any tenable constitutional objection be made to the application of these regulations to employees engaged in the type of activities here involved. The cases most closely in point conclusively establish that the activities of respondent's employee constitute interstate commerce. (See cases discussed in Section A of this brief.) Indeed the constitutional power of Congress over commerce has been held to cover a much broader scope of activity than is here involved. (Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board, supra; Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *Virginian Ry.* v. *Federation System, No. 40*, 300 U. S. 515; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381). It has long been recognized that activities which admittedly are not part of interstate commerce can be regulated by Congress where such regulation is necessary for effective control of interstate transactions. (Cf. *Shreveport* case, 234 U. S. 342, 351, 352; *The Minnesota Rate* cases, 230 U. S. 352, 339; *United States* v. *Rock Royal Co. Op., Inc.*, 307 U. S. 533, 568). *A fortiori* the activities of employees who are actually engaged in interstate commerce are clearly subject to the regulatory power of Congress under the commerce clause of the Constitution.

Conclusion.

Petitioner and respondent were "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act from October 24, 1938 to July 24, 1940. The respondent has failed to pay petitioner the minimum wage and overtime compensation required by the Act; it has failed to keep the records required by the Act; respondent thus has violated Sections 6 and 7 of the Act. It is respectfully submitted, therefore, that petitioner is entitled

to recover his unpaid minimum wages and unpaid overtime compensation, not only for the period from October 24, 1938 to January 1, 1939, but also for the period from January 1, 1939, to July 24, 1940.

Respectfully submitted,

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